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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**  
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10 HM MANJURUL POLASH,

11 Plaintiff,

12 v.

13 NATIONAL CITY MORTGAGE CO.,

14 Defendant.  
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Case No. 2:09-CV-02187-KJD-RJJ

**ORDER**

16 Currently before the Court is Defendant PNC Bank, National Association's ("PNC") Motion  
17 to Dismiss (#4), Motion to Strike Claim for Punitive Damages (#5), and Motion to Expunge Lis  
18 Pendens (#6).<sup>1</sup> Plaintiff filed a Response to each Motion (#22) jointly, to which PNC filed a Reply  
19 (#23). The Court considers each Motion and issues its ruling together herein.

20 **I. Background**

21 Plaintiff purchased the property located at 6724 Quinella Drive, Las Vegas, Nevada, on  
22 November 21, 2006. To purchase the property, Plaintiff obtained a first and second mortgage for  
23 \$312,000 and \$78,000 respectively, from PNC and Wells Fargo Bank, NA. The first mortgage was  
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26 <sup>1</sup>PNC's Motions are filed in its capacity as successor by merger to National City Bank, previously doing  
business as National City Mortgage Co.

1 for \$312,000 under an adjustable rate note.<sup>2</sup> Plaintiff fell behind on his mortgage payments and on or  
2 about April 16, 2009, received a letter from Cal Western Reconveyance on behalf of PNC and a  
3 Notice of Default and Election to Sell, stating that the property would be sold at a trustee's sale on  
4 August 27, 2009. Upon receiving the Notice of Default and Election to sell, Plaintiff allegedly  
5 entered into negotiations with PNC regarding the potential of a short sale, and contacted Cal Western  
6 to continue foreclosure. On or about September 28, 2009, the subject property was sold at a trustee's  
7 sale. One week following foreclosure, Plaintiff received a letter indicating that Financial Hope for  
8 America had been given access to the mortgage account as a part of the loan modification process.  
9 Plaintiff alleges that he relied on the representations of PNC that a modification agreement would  
10 occur, and that he would have taken other actions had he known PNC was going to foreclose on the  
11 property.

12 Plaintiff filed his Complaint in state court on October 15, 2009, alleging four causes of action  
13 against PNC, for: (1) Promissory Estoppel; (2) Wrongful Foreclosure/Quiet Title; (3)  
14 Misrepresentation; and, (4) Preliminary/Permanent Injunction. Here, PNC seeks that the Court  
15 dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon  
16 which relief can be granted, and Fed. R. Civ. P. 12(b)(7) for failure to name an indispensable party.  
17 In the alternative, PNC seeks that the Court grant summary judgment, strike Plaintiff's claim for  
18 punitive damages, and expunge the Lis Pendens pursuant to N.R.S. § 14.015. For the reasons stated  
19 herein, the Court finds that Defendant's Motion to Dismiss should be granted.

## 20 **II. Legal Standard**

21 Pursuant to Fed. R. Civ. P. 12(b)(6), a court may dismiss a plaintiff's complaint for "failure  
22 to state a claim upon which relief can be granted." A properly pled complaint must provide "a short  
23 and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.  
24 8(a)(2); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). While Rule 8 does not require  
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26 <sup>2</sup>The second mortgage, from Wells Fargo Bank, NA, is not the subject of this case.

1 detailed factual allegations, it demands more than “labels and conclusions” or a “formulaic recitation  
 2 of the elements of a cause of action.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Papasan  
 3 v. Allain, 478 U.S. 265, 286 (1986)). “Factual allegations must be enough to rise above the  
 4 speculative level.” Twombly, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint  
 5 must contain sufficient factual matter to “state a claim to relief that is plausible on its face.” Iqbal,  
 6 129 S. Ct. at 1949 (internal citation omitted).

7 In Iqbal, the Supreme Court recently clarified the two-step approach district courts are to  
 8 apply when considering motions to dismiss. First, the Court must accept as true all well-pled factual  
 9 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.  
 10 Id. at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory  
 11 statements, do not suffice. Id. at 1949. Second, the Court must consider whether the factual  
 12 allegations in the complaint allege a plausible claim for relief. Id. at 1950. A claim is facially  
 13 plausible when the plaintiff’s complaint alleges facts that allow the court to draw a reasonable  
 14 inference that the defendant is liable for the alleged misconduct. Id. at 1949. Where the complaint  
 15 does not permit the court to infer more than the mere possibility of misconduct, the complaint has  
 16 “alleged—but not shown—that the pleader is entitled to relief.” Id. (internal quotation marks  
 17 omitted). When the claims in a complaint have not crossed the line from conceivable to plausible,  
 18 plaintiff’s complaint must be dismissed. Twombly, 550 U.S. at 570.

### 19 **III. Analysis**

#### 20 **(1) Promissory Estoppel**

21 To establish a claim for promissory estoppel, four elements must exist: “(1) the party to be  
 22 estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon,  
 23 or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the  
 24 party asserting the estoppel must be ignorant of the true state of facts; and (4) he must have relied to  
 25 his detriment on the conduct of the party to be estopped.” Pink v. Busch, 691 P.2d 456, 459–60  
 26 (Nev. 1984).

Here, Plaintiff alleges that he “relied to his detriment that foreclosure would not occur and that a short sale agreement would be executed between the parties herein.” (Compl. ¶ 21.) It is undisputed however, that the parties never entered into a modification or short sale agreement. Plaintiff acknowledges that he was in the process of filing out a “modification application”, thus demonstrating that no agreement had been entered. (*Id.* at ¶ 13.) Plaintiff has failed to demonstrate an agreement between the parties, and asserts no valid basis upon which his claim for estoppel may rest. Plaintiff fails to allege any action that Defendant intended would be acted upon by Plaintiff, or that Plaintiff acted in a way demonstrating that he had a right to believe an agreement had been entered into that would estop foreclosure proceedings. Moreover, Plaintiff’s allegation that he relied to his detriment, or somehow made a detrimental change of position based upon Defendant’s conduct—that if he had known that foreclosure was going to occur he would have taken other action—is without merit. Plaintiff defaulted on his mortgage, and was sent a Notice of Default and Election to Sell. He has provided no evidence demonstrating a plausible belief or reason he should have believed his position had changed, or that foreclosure proceedings could not occur. Accordingly, Plaintiff’s claim for estoppel fails. Moreover, Plaintiff’s claim that he relied upon the communication from Financial Hope for America to his detriment fails, as said communication was admittedly received by Plaintiff subsequent to his receipt of the Notice of Default and Election to Sell, and after the trustee’s sale on the property had taken place.

**(2)Wrongful Foreclosure/Quiet Title**

“An action for the tort of wrongful foreclosure will lie [only] if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor’s or trustor’s part which would have authorized the foreclosure or exercise of the power of sale.” *Collins v. Union Federal Sav. & Loan Ass’n*, 662 P.2d 610, 623 (Nev.1983). “The material issue of fact in a wrongful foreclosure claim is whether the trustor was in default when the power of sale was exercised.” *Id.*

1 Here, Plaintiff's claim for wrongful foreclosure fails because he cannot allege that he was not  
 2 in default on his loan obligations when foreclosure proceedings were initiated, or that he made any  
 3 attempt to cure his default. Rather, Plaintiff alleges that he relied to his detriment "on the  
 4 representations of the Defendant that they were processing a modification agreement." (#22 at 7.)  
 5 Accordingly, through his own admissions, Plaintiff cannot allege that Defendant breached a  
 6 condition of the mortgage agreement sufficient to preclude foreclosure proceedings. (See Compl. ¶  
 7 5–6.) Thus, Plaintiff's claim for wrongful foreclosure fails.

### 8 **(3) Misrepresentation**

9 Misrepresentation is a form of fraud where a false representation is relied upon in fact. See  
 10 Pacific Maxon, Inc. v. Wilson, 96 Nev. 867, 871 (Nev.1980). Fraud has a stricter pleading standard  
 11 under Fed. R. Civ. P. 9(b), which requires a party to "state with particularity the circumstances  
 12 constituting fraud." Pleading fraud with particularity requires "an account of the time, place, and  
 13 specific content of the false representations, as well as the identities of the parties to the  
 14 misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007); see also, Morris v.  
 15 Bank of Nev., 886 P.2d 454, 456 n. 1 (Nev. 1994).

16 The elements for a claim of misrepresentation include (1) that a false representation was  
 17 made by the defendant, with (2) knowledge or belief that the representation is false—or, that he does  
 18 not have a sufficient basis of information to make the representation, (3) that defendant had an  
 19 intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation,  
 20 (4) that the plaintiff justifiably relied upon the representation in taking action or refraining from it,  
 21 and (5) that damage resulted to the plaintiff, arising from said reliance. Lubbe v. Barba, 540 P.2d  
 22 115 (Nev. 1975).

23 Plaintiff avers that Defendant's involvement in his loan transaction and participation in a  
 24 government imposed loan modification program exceeded the scope of its conventional role as a  
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1 lender, and created a fiduciary relationship which resulted in constructive fraud.<sup>3</sup> The Court does not  
2 agree.

3 As stated above, Plaintiff has failed to demonstrate the existence of any short sale or  
4 modification agreement between the parties, or any action on behalf of Defendant intended to induce  
5 Plaintiff to act or not act in regards to his pending foreclosure, or that Plaintiff acted in a way  
6 demonstrating that he had a right to believe an agreement had been entered into that would preclude  
7 or stall foreclosure proceedings. Moreover, the Court finds that Plaintiff has failed to allege his  
8 misrepresentation claim with sufficient particularity. Accordingly, Plaintiff's misrepresentation  
9 claim also fails.

#### 10 **(4) Preliminary/Permanent Injunction**

11 Though Plaintiff's fourth cause of action brings a claim for injunctive relief, the Court notes  
12 that injunctive relief is not a cause of action in itself, but a type of relief which is only available  
13 should Plaintiff be able to show a likelihood of success on the merits of his other causes of action.

14 The basis for injunctive relief in the federal courts is irreparable injury and the inadequacy of  
15 legal remedies. See Weinberger v. Romero-Barcello, 456 U.S. 305, 312 (1982). In each case, the  
16 Court must balance the competing claims of injury and must consider the effect on each party of the  
17 granting or withholding of the requested relief. All courts agree that the plaintiff must satisfy the  
18 general equitable requirements by showing a significant threat of irreparable injury and that the legal  
19 remedies are inadequate. See Arcamuzi v. Cont'l Airlines, Inc., 819 F.2d 935, 937 (9th Cir. 1987).  
20 The traditional test focuses on whether the plaintiff has demonstrated a fair chance of success on the  
21 merits at the minimum, a significant threat of irreparable injury, at least a minimal tip in the balance  
22 of hardships, and whether any public interest favors granting the injunction. See American  
23 Motorcycle Ass'n. v. Watt, 714 F.2d 962, 965 (9th Cir. 1983). An alternative test permits the  
24 plaintiff to meet its burden by showing either a combination of probable success on the merits and

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26 <sup>3</sup>It is generally accepted that a fiduciary relationship does not exist between a buyer and seller in an arms' length transaction. See Executive Mgmt. Ltd. v. Ticor Title Ins. Co., 963 P.2d 465, 477 (1998).

1 the possibility of irreparable injury or serious questions as to these matters and the balance of  
2 hardships or public interest tips sharply in plaintiff's favor. See First Brands Corp. v. Fred Meyer,  
3 Inc., 809 F.2d 1378 (9th Cir. 1987). These are not separate tests but the outer reaches of a single  
4 continuum. See L.A. Mem'l Coliseum Comm'n v. NFL, 634 F.2d 1197, 1201 (9th Cir. 1980).

5 As discussed above, Plaintiff has failed to demonstrate a likelihood of success on the merits  
6 for his estoppel, unlawful foreclosure, or misrepresentation claims. Moreover, he has failed to show  
7 the emergent circumstances required to merit injunctive relief, or that the balance of hardships or  
8 public interest tips in his favor. Accordingly, the Court finds that Plaintiff's claim seeking injunctive  
9 relief also fails as a matter of law.


10 **IV. Conclusion**

11 **IT IS HEREBY ORDERED** that Defendant PNC Bank, National Association's Motion to  
12 Dismiss (#4) is **GRANTED**. Judgment to be entered on behalf of Defendant PNC and against  
13 Plaintiff.

14 **IT IS FURTHER ORDERED** that PNC's, Motion to Strike Claim for Punitive Damages  
15 (#5), is **DENIED** as moot.

16 **IT IS FURTHER ORDERED** that PNC's Motion to Expunge Lis Pendens (#6) is  
17 **GRANTED**.

18 DATED this 4th day of November 2010.

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22 Kent J. Dawson  
23 United States District Judge  
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